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In the Supreme Court
OF THE
United States

OCTOBER TERM 1956

No. 791

STELLA C. DAVIS and BETTY HORRIGAN,
Appellants,

vs.

ELLIOT W. SEYMOUR,
Appellee.

MOTION TO DISMISS APPEAL AND ALTERNATIVE MOTION TO AFFIRM JUDGMENT.

ELLIOT W. SEYMOUR,
785 Market Street, San Francisco 3, California,
Appellee, In pro. per.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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The appellee, Elliot W. Seymour, moves the Court to dismiss the appeal of Stella C. Davis and Betty Horrigan, appellants herein, and in the alternative to affirm the judgment and order of the lower court.

STATEMENT OF FACTS.

The appellant Stella C. Davis, as plaintiff, on *September 12, 1956,* filed a civil action for damages in

the United States District Court for the Northern District of California, Southern Division, against appellee as defendant. (Transcript of record pages 1-5). Thereafter, appellant Betty Horrigan filed a petition to intervene in said action as a party plaintiff, but she failed to secure an order to intervene therein. The complaint is predicated on circumstances which allegedly occurred in the month of *March, 1951.*

Appellee, as defendant in said action, filed therein a written motion to dismiss said action with supporting affidavit, on the ground that the complaint failed to state a claim against defendant, upon which relief could be granted; and on the further ground that said action was barred by the California statutes on limitations of actions, Code of Civil Procedure sections 337 (4 years), 338 (3 years), and 339 (2 years).

The lower court, on November 29, 1956, after oral argument had on November 19, 1956, all parties being present, made and entered an order dismissing the complaint of Stella C. Davis, and the cause of action of Betty Horrigan as petitioner in intervention.

The appellants herein filed a notice of appeal from said order and decree on *December 24, 1956,* specifying United States Code, Title 28, section 1257 (2) and (3) as the statute under which the appeal to this Court is taken (Notice of Appeal, page 1, lines 28 and 29). Thereafter, and on or about January 14, 1957, the appellants filed an amended notice of appeal, specifying United States Code, Title 28, section 1252 as the statute under which the appeal to this Court is taken (Amended Notice of Appeal, page 1, line 24).

This case was docketed, and the record filed with the clerk of this Court on February 23, 1957. Appellee has never received any notice of or copy of any order enlarging the time for docketing this case.

MOTION TO DISMISS.

This motion to dismiss appeal is made on the ground that the appeal is not within the jurisdiction of this Court, because it has not been taken in conformity to any applicable statute, or to any statute, or in conformity to the rules of this Court.

It is unnecessary to argue to this Court that sections 1252 and 1257 of Title 28, U. S. Code, do not apply in this case. Section 1252 has to do with direct appeals from decisions invalidating acts of Congress, in proceedings to which the United States or any of its agencies, or an officer or employee thereof, as such, is a party. Section 1257 has to do with appeals under certain circumstances from final judgments or decrees rendered by the highest Court of a state. Obviously, neither of the sections is applicable in this appeal, nor is there any applicable statute under which, in the instant case, a direct appeal could be had to this Court.

Secondly, the appellants failed to comply with the provision of rule 13 of this Court in that they failed to docket the case and to file the record with the clerk of this Court within sixty days after the filing of their notice of appeal. The notice of appeal was filed December 24, 1956, and the case was docketed

February 23, 1957, being the sixty-first day after the filing of the notice of appeal. Consequently, the appellants failed to perfect their appeal within the time prescribed by said rule 13 of this Court.

MOTION TO AFFIRM THE JUDGMENT.

This alternative motion to affirm the judgment and decree of the lower court is made on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The questions presented by this appeal are set forth on pages 4 and 5 of appellants' "Jurisdictional Statement and Brief," filed with the clerk of this Court on February 23, 1957. These questions are too absurd, unfounded and unsubstantial to require further answer or argument, and appellee will rely on the transcript of the record in this case.

Further, as appears from the record, appellee did not desire to base his motion to dismiss in the lower court, solely on the ground of the statute of limitations. The transcript of the record discloses that all of the facts were before the lower court, when the order appealed from was made and entered. However, it is apparent on the face of the complaint filed in the lower court by appellant Davis (Transcript of Record, pages 1-5) that if any cause of action existed, the same was barred by the California statutes on limitations of actions, Code of Civil Procedure, sections 337, 338 and 339 (supra).

It is respectfully submitted that the appeal by appellants should be dismissed on the ground the appeal is not within the jurisdiction of this Court, and for the further reason that the appeal was not docketed within the time allowed by the rules of this Court; and that in the alternative the decree and order appealed from should be affirmed.

Dated, San Francisco, California,
April 22, 1957.

ELLIOT W. SEYMOUR,
Appellee, In pro. per.